

IN THE MATTER of the Gambling Act 2003
AND on appeals by **CARDIGAN BAY HOLDINGS LIMITED** and **THE TRUSTS COMMUNITY FOUNDATION LIMITED** in respect of premises known as Wilson's Bar

BEFORE THE GAMBLING COMMISSION

Members: D C Matahaere-Atariki
W N Harvey
S C L Pearson

Date of Appeals: 30 September 2019 and 4 October 2019

Date of Decision: 13 March 2020

Date of Notification of Decision: 1 May 2020

DECISION ON APPEALS BY CARDIGAN BAY HOLDINGS LIMITED AND THE TRUSTS COMMUNITY FOUNDATION LIMITED

Introduction

1. Cardigan Bay Holdings Limited ("**CBHL**") and The Trusts Community Foundation Limited ("**TTCF**") (together the "**Appellants**") appealed, under section 77(1)(a) of the Gambling Act 2003 ("**Act**"), against a decision made by the Secretary for Internal Affairs ("**Secretary**") refusing TTCF's application for a new class 4 venue licence for premises known as Wilson's Sports Bar & TAB at 25 Riccarton Road, Riccarton, Christchurch ("**Wilson's Bar**").
2. The Secretary requested information about all members of the Board and executive staff of Harness Racing New Zealand Incorporated ("**HRNZ**"), of which the venue operator, CBHL, was a wholly owned subsidiary. Not all of the requested information was provided. The Secretary refused to grant the application under section 67(1)(d) of the Act, because he could not be satisfied, under section 67(1)(d), (r) and (s) of the Act, that key persons of the class 4 venue were suitable (in terms of section 68 of the Act) and, under section 67(1)(r) and (s) of the Act, about the likelihood of compliance with the Act, specifically the potential for involvement in activities or decisions prohibited by section 113 of the Act.

3. The appeals were brought in order to obtain the Commission's decision on the breadth of the Secretary's request for information and subsequent decision about the suitability of key persons in relation to the class 4 venue licence application. It is common ground between the parties that, irrespective of the decision on that issue, the matter should be referred back to the Secretary for reconsideration in light of the Commission's ruling.
4. The Commission considers that the principal issue for determination is whether the Commission is satisfied that all members of the Board and executive staff of HRNZ are not key persons in respect of TTCF's application for a class 4 venue licence for Wilson's Bar.

Background

5. On 6 September 2018, TTCF applied for a new class 4 venue licence for Wilson's Bar.
6. Wilson's Bar is owned by CBHL, specified in the application as the venue operator. At the time of the application to the Secretary, the shares in CBHL were held on trust by CBHL's directors (Colin Hair, Gary Allen and Peter Smith) for HRNZ. The shares were transferred directly to HRNZ on 20 December 2019.
7. HRNZ is an incorporated society and is governed by a Board in accordance with its constitution. Colin Hair, a director and former shareholder of CBHL, is a Board member and the vice chairman of HRNZ.
8. The parties agree that the day-to-day management of Wilson's Bar is undertaken by the venue manager, Rachel Roberts, and that the management of Wilson's Bar is overseen and monitored by a specialist hospitality management company, G.B.G. Consultants Limited ("**GBG**"), through a management agreement between CBHL and GBG.
9. There is an executed venue agreement between TTCF and CBHL for Wilson's Bar, which was provided as part of the class 4 venue licence application.
10. Colin Hair deposed that there was a short period in mid-2018 during which Jenny Fleming, HRNZ's finance manager, assisted with tasks associated with the Wilson's Bar purchase and the change in ownership, being tasks that he would normally have undertaken but for the fact that he was recovering from surgery. Mr Hair also deposed that there was a short period in 2018 when two HRNZ administrative staff were engaged in overseeing the float and cash management at Wilson's Bar but that it was a temporary arrangement put in place while CBHL was looking for a full-time duty manager, who has now been employed by CBHL, bringing the arrangement to an end.

11. On 5 February 2019, the Secretary, acting through officials at the Department of Internal Affairs (“Department”), requested that personal information forms (“PIFs”) be completed by each member of the Board and executive of HRNZ.
12. On 2 August 2019, Mr True, counsel for TTCF and CBHL, advised the deputy director of Gambling Operations at the Department by email that the full HRNZ Board and executive staff did not consider that they came within the key person definition and accordingly would not provide PIFs. In his email, Mr True accepted that HRNZ board members who had the ability to appoint and remove CBHL directors are key persons but went on to state:

The director appointment role and all management oversight will be formally delegated to two directors (the independent directors). The independent directors will provide personal information forms. A resolution will be passed confirming that the other board members and the executive staff have no authority to make any management or operation decisions in relation to Cardigan Bay Holdings Ltd.

13. The Secretary’s decision of 18 September 2019 refusing the application stated:

...

4. Whilst conducting enquiries during the initial assessment of the application, the Department of Internal Affairs found that Jenny Fleming, Finance Manager for Harness Racing NZ (HRNZ) was involved with CBHL’s acquisition of the venue and found that shares in CBHL are held on trust by trustees on behalf of HRNZ and CBHL directors who are also trustees.
5. HRNZ is not listed as a shareholder of CBHL on the Companies Office register nor were HRNZ included as a key person of the venue operator company on the application submitted by TTCF.
6. Further investigation found HRNZ employees were performing and carrying out duties within the venue whilst employed by HRNZ rather than the staff directly employed by CBHL.
7. The Department is aware that the financial statements for HRNZ show no degree of separation between the board, HRNZ and CBHL given their direct funding model. This model will clearly have influence directly or indirectly on CBHL management and operation.
8. Considering CBHL holds shares in trust on behalf of HRNZ, HRNZ’s involvement in the acquisition of the venue and HRNZ providing funding to CBHL to expand its operations, the Department considers HRNZ can exert significant influence whether directly or indirectly over the management and operations of CBHL. Furthermore, considering HRNZ staff members involvement in the day to day operations of the venue the Department considers that HRNZ is directly linked to and has the ability to further exert significant influence directly and indirectly over the management and operations of the venue operator company and its venues.
9. Therefore, HRNZ and its board members satisfy the definition of a key person in relation to a class 4 venue as per section 4 of the Act.

...

12. Due to TTCF’s refusal to provide PIF’s for the Board Members’ of HRNZ the Secretary is unable to determine whether the class 4 venue key persons are suitable for the purpose of section 66 and 67 of the Act.

13. Furthermore, TTCF's refusal to provide PIFs completed by the Board Members of HRNZ because they do not want to be recognised as key persons of the class 4 venue highlights a specific risk to ensuring that there are no relationships that may be considered unsatisfactory in terms of section 113 of the Act.
- ...
16. Whilst the draft resolution proposes to minimise the direct influence of HRNZ over CBHL it does not extend to funding arrangements for CBHL nor does it address HRNZ's fiscal interest already demonstrated in the business of CBHL. Therefore, the Department is unable to be satisfied that HRNZ and its Board Members by extension are not key persons of the class 4 venue.
14. On 30 September 2019, CBHL appealed the Secretary's decision to the Commission.
15. On 4 October 2019, TTCF appealed the Secretary's decision to the Commission.
16. On 24 October 2019, HRNZ's Board passed a resolution delegating the Board's powers with respect to CBHL to what it called the independent directors. The following resolutions were made in relation to the appointment and removal of CBHL directors:
- a. The power to make decisions in respect of the appointment and removal of CBHL directors is hereby delegated so as to vest solely and exclusively in the independent members of the board, who are appointed from time to time by the Independent Appointments Committee ("the Independent Members") in accordance with clauses 10.14 and 14.9 of the constitution of HRNZ.
 - b. The HRNZ board members who are not Independent Members shall have no authority to nominate suitable candidates for a CBHL directorship and shall not have any input into the process of appointing and/or removing CBHL directors.
 - c. The HRNZ board members warrant that they will sign and deliver and do all things reasonably required to enable the Independent Members to effect their decisions in respect of the appointment and removal of directors of CBHL, including but not limited to signing the requisite shareholders' resolutions of CBHL.
17. The resolution stated that "the CBHL directors and CBHL management (including the management company) shall be advised of the above restriction and directed to disregard any communication received from a HRNZ board member who is not an Independent Member". It also stated that "the above provision does not prohibit the full board and/or HRNZ executive staff receiving and reviewing standard accountancy reports regarding CBHL's financial performance as part of HRNZ's standard accounting practice. The above provision also does not prevent HRNZ and HRNZ staff providing purely routine administrative services to CBHL such as bookkeeping and payroll services".
18. The resolution also stated:
- The intention is for the above process to remain in place permanently. However, if in the future a change in the appointment and removal process is required, or a change in the management structure is required, this may occur by the full HRNZ

board passing a resolution rescinding or amending the above process. If the process is rescinded or amended, the Department will be advised, and consideration given to whether the full board then falls within the definition of a key person (as set out in section 4 of the Gambling Act 2003).

19. On 1 December 2019, Victoria McCrae and Philip Holden were appointed as the independent directors of HRNZ.

Relevant legislation

20. The key sections are sections 65, 66 and 67 of the Act. Section 65 provides, relevantly, that:

...

- (6) The Secretary may request from the applicant any further information that the Secretary considers necessary to consider the application properly.

21. Section 66 provides, relevantly, that:

- (1) The Secretary must undertake any investigations the Secretary considers necessary to determine—

- (a) whether the applicant is eligible and suitable to be granted a class 4 venue licence; and
 (b) whether the venue manager and venue operator are suitable persons in terms of section 68.

- (2) The Secretary may undertake whatever investigations the Secretary considers necessary to determine whether any other key person is a suitable person in terms of section 68.

- (3) In undertaking investigations, the Secretary may—

- (a) require the applicant and any key person to provide further information relating to the application and to undergo an independent investigation into its financial position and credit history by a person nominated by the Secretary;

...

- (5) A person required to provide information under this section must provide the information as promptly as is reasonable in the circumstances.

- (6) Subsection (3) does not limit subsection (1) or (2).

22. Section 67 provides:

- (1) The Secretary must refuse to grant a class 4 venue licence unless the Secretary is satisfied that—

...

- (d) any investigations carried out by the Secretary do not cause the Secretary not to be satisfied about the suitability of any other key person, in terms of section 68; and

...

- (r) there are no other factors that are likely to detract from achieving the purpose of this Act; and
- (s) the applicant is able to comply with all other applicable regulatory requirements.

23. Section 4 of the Act defines “key person” as follows:

...

- (b) in relation to a class 4 venue licence,—
 - (i) a venue manager:
 - (ii) venue personnel:
 - (iii) a venue operator:
 - (iv) a person who is a director, chief executive, or senior manager of a venue operator:
 - (iva) a person who has a significant interest in the management, ownership, or operation of a venue operator, except for the following persons holding office, elected, or appointed under the Sale and Supply of Alcohol Act 2012:
 - (A) a member of a licensing trust elected in accordance with sections 308 to 314 of that Act or appointed under section 315 of that Act; or
 - (B) a trustee of a community trust holding office under section 369 of that Act or elected in accordance with sections 370 to 373 of that Act or appointed under section 374 of that Act:
 - (ivb) a person who has the ability, directly or indirectly, to exert a significant degree of influence over the management or operations of a venue operator, except for the following persons holding office, elected, or appointed under the Sale and Supply of Alcohol Act 2012:
 - (A) a member of a licensing trust elected in accordance with sections 308 to 314 of that Act or appointed under section 315 of that Act; or
 - (B) a trustee of a community trust holding office under section 369 of that Act or elected in accordance with sections 370 to 373 of that Act or appointed under section 374 of that Act:

...

24. Section 4 of the Act further defines “venue manager”, “venue operator” and “venue personnel” as follows:

venue manager means 1 natural person responsible for supervising the gambling and venue personnel at a class 4 venue and for banking the proceeds of class 4 gambling

venue operator means the occupier of a class 4 venue for which the licence application was required under section 65(3) to be accompanied by a class 4 venue agreement where the occupier owns the primary business at the venue

venue personnel means a person who works at a class 4 venue or a casino and whose work involves dealing with gambling equipment, gamblers, or the proceeds of gambling

25. Section 113(1) provides that a key person in relation to a class 4 venue licence, the application for which was required under section 65(3) to be accompanied by a class 4 venue agreement, must not engage in specified activities nor be involved in certain decisions in relation to class 4 gambling and the net proceeds from the gambling.
26. Section 118 provides that certain persons, including a key person in relation to a class 4 venue licence, must not seek, receive or offer benefits with improper conditions attached.

Submissions

Appellants' submissions

27. CBHL and TTCF sought clarification of the status of the full HRNZ Board. They asked that, if the Commission found that all the individual HRNZ Board members fall within the key person definition, rather than confirming the decision of the Secretary, the Commission should refer the matter back to the Secretary for reconsideration in order to give time for the required PIFs to be provided or, alternatively, for HRNZ to divest itself of the shareholding and for the new shareholders to provide the required PIFs.
28. CBHL and TTCF submitted, in summary:
- (a) It accepted that the following persons are key persons in relation to the venue:
 - (i) CBHL and its directors, including Colin Hair;
 - (ii) Ms Roberts;
 - (iii) GBG and Grant Goodwin and Jane Goodwin; and
 - (iv) HRNZ and the two independent members of HRNZ's Board.
 - (b) What was contentious was whether the remaining members of HRNZ's Board, John Coulam, Kevin McNaught, Ken Spicer, Ross Johnson and John Grainger, ("**contested persons**") are venue key persons.
 - (c) The Gambling Amendment Act (No 2) 2015 amended the definition of a venue key person. The prior definition included anyone the Department "reasonably believes" to have a significant interest in the management, ownership or operation of a venue operator. The current definition requires the person to have an actual significant interest in a venue operator or an actual ability to exert a significant degree of influence over the venue operator. The test

changed from a subjective to an objective one. If the Secretary considered that a person may be a key person, that person must satisfy the Secretary either that they are not a key person or that they are suitable.

- (d) The Commission hears matters *de novo* under section 77(3)(d).
- (e) In relation to a significant interest in the management, ownership or operation of a venue operator, the contested persons' roles are to govern HRNZ, an entity that administers harness racing, and do not include managing the day-to-day operation of CBHL or its venues. If any management interest did previously exist, it is now vested solely in the independent board members by the resolution of 24 October 2019.
- (f) Any management interest would not be significant. "Significant" in the Gambling Act context means "very important" or "major". When considering whether a person has a significant interest in the management, ownership or operation of a venue operator, regard needs to be had to the extent that the management interest plays in relation to their other roles and to the management arrangements in place. The individual board members do not have any personal interest in CBHL.
- (g) A person who has a significant interest in the operation of a venue operator is a person who has a significant interest in the systems and procedures in place at a venue. The contested persons had no input into the operational systems used by CBHL. The 24 October 2019 resolution means that the contested persons have no authority to exert influence over the operations of CBHL. If the contested persons did have an interest in whether an operational system was adopted over another, that interest would be *de minimus* having regard to HRNZ's annual revenue and total assets and could not be described as significant.
- (h) None of the contested persons have the ability to exert a significant degree of influence over the management or operations of CBHL. Management and operational matters are determined by a company's directors, not by its shareholders. The role of a shareholder is limited to appointing and removing directors, approving or declining major transactions and receiving annual performance data. The role of appointing directors and considering major transactions has been delegated solely to the independent directors.
- (i) There is no risk or concern in relation to section 113 because it only applies to venue key persons and, if the contested persons are held to be outside the

venue key person definition, any action taken by them in their capacity on another board would not result in a section 113 breach.

Secretary's submissions

29. The Secretary asked that the appeals either be dismissed or preferably referred back to him to give the Appellants time to provide the requested information, if required, and otherwise for him to reconsider the application with the benefit of complete information.
30. The Secretary submitted, in summary:
- (a) All Board members are venue key persons.
 - (b) It is now accepted that HRNZ executive staff members are not venue key persons, as a result of the instructions issued by the HRNZ Board to the HRNZ executive staff.
 - (c) The relevant part of the venue key person definition is the "ability" to influence, which does not require proof that influence is being exerted at any particular time. The HRNZ Board members have the ability to influence CBHL's operations as a result of:
 - (i) the constitution of CBHL and the sole shareholder rule,
 - (ii) the role of the HRNZ Board members, and
 - (iii) the financial control that the HRNZ Board has over CBHL's operations.
 - (d) TTCF's history of distributing more net proceeds to trotting clubs than any other racing code, and CBHL's history as an investment vehicle for HRNZ, support an inference that CBHL's main purpose is to generate gaming machine profits that can be distributed back to the harness racing code via corporate societies, rather than being a profitable hospitality trader in its own right.
 - (e) The most relevant limb of the venue key person definition in section 4 of the Act is subparagraph (ivb) regarding "the ability to exert, directly or indirectly, a significant degree of influence".
 - (f) The issue is not whether the Board members have the ability to influence the particular management operations of Wilson's Bar, but whether they have the ability to influence the particular management and operations of CBHL, the venue operator.

- (g) The standard of proof is the civil standard. The Secretary (or the Appellant as the case may be) does not need to prove key person status beyond reasonable doubt, but on the balance of probabilities.
- (h) The Secretary agrees that the matter should be determined *de novo*.
- (i) Parliament has not limited the venue key person definition in subparagraph (ivb) to persons who do influence but has extended it to persons who have the capacity to exert influence, whether or not they choose to do so.
- (j) The guidance provided by the Commission in the *Decision on an appeal by Phoenix Charitable Trust Ltd GC04/14* ("**Phoenix**") on how section 52 (the grounds for granting a class 4 operator's licence) should be applied is relevant to consideration of class 4 venue applications. For operator's licences, it is an express requirement that the application include a profile of each key person. While the equivalent provision for venue licences requires only a profile of the venue manager and venue operator, as the Secretary must still be satisfied of the suitability of each venue key person under section 67(1)(d), all key persons must be identified and assessed.
- (k) The High Court's decision in *R v O'Brien* [2017] NZHC 1317 ("**Operation Chestnut**") indicates that, in resolving any ambiguity concerning application of the definition:
- (i) the object of the Act should be taken into account,
 - (iv) the governance structure is not, on its own, determinative, and
 - (v) each determination is highly fact-dependent.
- (l) While all purposes in section 3 of the Act are relevant, the reason for identifying "key persons" is mainly to limit opportunities for crime or dishonesty associated with gambling or the conduct of gambling, by ensuring transparency and placing limits on key person activities.
- (m) In the appeal of *Operation Chestnut*,¹ the Court of Appeal said, when discussing key person definitions, that the Department must be satisfied that no one who is a key person in relation to a class 4 operator's licence is also a key person in relation to a class 4 venue licence.

¹ *O'Brien v R* [2019] NZCA 83.

- (n) There must also be separation between venue occupiers (venue key persons), licence holders (society key persons) and grant applications, which is apparent from sections 113 and 118 of the Act. The need for an arm's length relationship between grant recipients and venue key persons is to reduce the risk of breaches of those sections.
- (o) CBHL is a legal entity in its own right, separate from HRNZ. Under clause 18.7 of its constitution, because CBHL is wholly owned by HRNZ, the CBHL directors may act in a way that puts HRNZ's interests first, before those of CBHL. As a result, CBHL's directors should know what the best interests, purposes and goals of HRNZ are; they are matters governed by the HRNZ Board under HRNZ's constitution. Accordingly, the HRNZ Board members will, at a minimum, significantly influence CBHL through application of the sole shareholder rule.
- (p) The resolution of 24 October 2019 delegated the Board's powers with respect to CBHL to the independent directors. However, the resolution can be rescinded, and, under the constitution, any Board member may raise the matter at any time. While the "use" of any direct or indirect influence by the Board members on CBHL may have been curtailed by the resolution for the time being, the "ability" to use that influence remains, requiring only one extra layer of paperwork. The ability to exert influence still remains and cannot be delegated away.
- (q) The ability to influence is inherent in the constitution of HRNZ.
- (r) The Board members have the ability, indirectly (or directly), to influence CBHL's operations through:
 - (i) the Board's role of doing all things necessary so the business, interests and affairs of HRNZ and harness racing are efficiently administered and managed between meetings of HRNZ,
 - (vi) the Board's wide powers in respect of finance, and
 - (vii) HRNZ's ability to inject funds into CBHL.

The last matter has a clear influence on what activities CBHL can carry out. Control over provision of funding is held by the HRNZ Board members. Under the constitution, a mere three members would be required in some cases to authorise transactions.

- (s) There are three other CBHL venues: one licensed to TTCF and two with a different corporate society. The Secretary intends to take a consistent position with all four venues.

Appellants' reply submissions

31. The Appellants lodged submissions in reply as follows:

- (a) The Secretary accepted that:
- (i) The HRNZ executive and HRNZ staff do not fall within the venue key person definition.
 - (ii) The contested persons do not have a significant interest in the management, ownership or operations of CBHL.
 - (iii) The contested persons do not currently possess the ability, directly or indirectly, to exert a significant degree of influence over the management or operations of CBHL.
- (b) The issue is whether "the ability to exert" requires an actual current ability to exert and excludes a theoretical future ability that might be used only after existing prohibitions or restrictions were removed. It requires the existence of a current legal power, although it is not necessary to show that the legal power is presently being exercised or likely to be exercised in the future.
- (c) In relation to the provision of a bond under section 195, the Secretary would look at the current ability of the nominee to pay the bond on demand, rather than a theoretical ability to pay if the nominee were to benefit from a future financial windfall, or a theoretical inability to pay if the nominee were to suffer future loss due to an unforeseen event such as a natural disaster.
- (d) Regard must be had to the natural and ordinary meaning of the term "ability".
- (e) As the test is factual, the likelihood of having a future legal power to influence CBHL is relevant. The contested persons have no wish to be able to influence CBHL in the future and lack the experience or specialist knowledge to manage small hospitality venues.
- (f) The contested persons lack the legal capacity to exert a significant degree of influence over the management or operations of CBHL, as the result of the formal resolution, and doing so is prohibited in practice by the instruction to CBHL to disregard any attempt to breach the resolution.

- (g) If the Secretary's position is that a theoretical future ability to influence is sufficient to bring an individual within the key person test, a very large section of the New Zealand adult population would be caught. Any individual who has the ability to raise \$500,000 would be able to purchase a gaming venue and thereby to influence the way the venue is managed and operated.
- (h) The issue is whether an individual has the ability to exert a significant degree of influence. The ability of each individual needs to be considered separately.
- (i) If the current prohibition on influencing the management or operations of CBHL needs to be entrenched, the Appellants would be happy to do so.
- (j) HRNZ would be happy for the venue licence to include a formal licence condition prohibiting rescission or amendment of the resolution without the Secretary's prior written consent. TTCF and CBHL would consent to such a licence condition.
- (k) HRNZ would be willing to entrench the resolution in HRNZ's constitution by amending the constitution.
- (l) The power to limit or increase future funding is too theoretical and future-focused to be taken into account.
- (m) HRNZ would be happy to formalise the sub-committee funding delegation and to put forward the sub-committee members as key persons.

Analysis

Approach on appeal

- 32. The Commission's settled approach to appeals regarding class 4 venue licences is to consider and determine the application afresh, as though it were the decision maker in the first instance and is not bound to follow any formal procedures.² Such a *de novo* approach has been endorsed by the Court of Appeal.³
- 33. In doing so, the Commission takes into account all material facts before it, including the 24 October 2019 resolution and board structure changes which followed the Secretary's decision. The Commission adopts the perspective of the Secretary and the currently held information in addressing the primary issue.

² Gambling Commission Practice Notes, Note 22.

³ *Secretary for Internal Affairs v Pub Charity* [2013] NZCA 627 at [70].

Key persons

34. The Agreed Statement of Facts frames the key issue as “whether the full HRNZ Board and the HRNZ executive staff are venue key persons in respect of Wilson’s Bar”. Such a formulation does not encapsulate the correct test for the Commission on appeal, having regard to the *de novo* nature of an appeal and the double-negative test in section 67(1)(d). The Commission considers that a more accurate formulation of the issue is “whether the Commission is satisfied that all members of the HRNZ Board and all HRNZ executive staff are not key persons in respect of Wilson’s Bar”.
35. “Key person in relation to a class 4 venue licence” is defined in section 4(1) of the Act. Having regard to all of the possible classes of applicable persons, the question can be reduced to whether the HRNZ Board members and HRNZ executive staff are key persons in relation to the class 4 venue licence by virtue of them having either:
- (a) a significant interest in the management, ownership, or operation of the venue operator (subparagraph (iva)); or
 - (b) the ability, directly or indirectly, to exert a significant degree of influence over the management or operations of the venue operator (subparagraph (ivb)).
36. Relevant considerations include the extent to which the answer is affected by the 24 October 2019 board resolution and the board restructure and whether the HRNZ executive staff are venue personnel by virtue of their administrative role in CBHL, despite the Secretary no longer contending that they are key persons.
37. Amendments to the key person definition were made by the Gambling Amendment Bill (No 3) and came into effect on 21 October 2015. The relevant changes to the meaning of key person “in relation to a class 4 venue licence” were two-fold:
- (a) What is now subparagraph (iva), which deals with “significant interest in the management, ownership, or operation of a venue operator”, is now expressed in objective language, rather than as a matter of the Secretary’s reasonable belief.
 - (b) The addition of subparagraph (ivb) was new, with no earlier equivalent. It is the aspect on which the Secretary placed the greatest weight.
38. The Hansard record for the first reading of the Gambling Amendment Bill (No 3) stated that the changes to the key person definition were intended “to reduce any conflicts of interest and deal with any indirect conflicts of interest where there could be some benefits derived in an improper manner”.⁴ The changes were to “help stop the situation

where somebody who is involved in the administration of one of the societies, or in the running of the pokie machines, can eventually end up being a beneficiary of the grants".⁵

39. The proposed new section 4(1)(b)(ivb) originally included the words "or who may reasonably be perceived to have that ability." Those words were removed following a recommendation in the Gambling Amendment Bill (No 3) Government Administration Committee Report because "...a reasonable perception provision is unnecessary, as only those who could in fact exert (undue) influence on a "key person" need to be captured".⁶

Standard of proof

40. The Secretary submitted that the appropriate standard of proof is the civil standard of proof on the balance of probabilities (and the Appellants made no submissions on the point).
41. The Commission disagrees with the Secretary. It adopts the approach which it previously outlined in *Decision on an appeal by Bluegrass Holdings Ltd GC10/14* ("**Bluegrass**") and in *Phoenix*.⁷
42. *Bluegrass* concerned an appeal against the cancellation of a class 4 operator's licence under section 58(1)(a), (b) and (d) of the Act. Relevantly, the Secretary was no longer satisfied of the requirement that, after investigation, nothing caused him not to be satisfied of the suitability of the appellant and its key persons, pursuant to section 52(1)(h). That section is written in identical terms to section 67(1)(d) relating to class 4 venue licences and is a ground for cancellation of an operator's licence under section 58(1)(a).
43. The Commission held that most of the issues on appeal carried no formal burden of proof.⁸ On all of the issues **except suitability under section 52**, the question for the Commission was whether it was satisfied that the ground was established on the basis of the evidence before it on the balance of probabilities.⁹ In relation to suitability, the Commission held:

The wording of section 52 requires doubts about satisfaction of the section 52 requirements to be resolved in favour of refusal of the licence. In the Commission's view, a similar approach should be taken on an appeal against

⁴ Sarah Dowie, MP for National. Gambling Amendment Bill (No 3) First Reading.

⁵ Chris Hipkins, MP for Labour. Gambling Amendment Bill (No 3) First Reading.

⁶ Gambling Amendment Bill (No 3) Government Administration Committee Report, at 4.

⁷ *Decision on an appeal by Phoenix Charitable Trust Ltd GC04/14*

⁸ At [26].

⁹ At [27].

cancellation for non-satisfaction of the section 52 suitability requirement. For the requirement to be met, the Secretary must be satisfied. The Commission considers that, on an appeal, it should ask itself the same question: is it satisfied that the Secretary's investigations do not cause it not to be satisfied about suitability? If not satisfied, it may confirm the cancellation on that ground alone.

The manner in which section 52 is expressed also applies to an assessment (for the purpose of section 52(1)(h)) of whether or not someone is a key person. When the Secretary is considering whether or not he is satisfied that there are no concerns regarding the suitability of an applicant's key persons, this will necessarily entail satisfaction about who the key people are. If the circumstances suggest that a person may be a key person (who is not so named on the application) and the Secretary has concerns about that person's suitability, doubts about whether he or she is a key person should be resolved in the same way as doubts about suitability, namely against the applicant. Otherwise, section 52(1)(h) would set a lower threshold for named key persons only: the question of suitability would not arise in relation to suspected key persons unless it could be established to a higher standard that they were key persons. This would be inconsistent with the purpose of section 52(1)(h), which is to preclude the grant of a licence unless the Secretary is positively satisfied that there are no concerns about the suitability of "any key person".

44. The Commission's approach was confirmed in *Phoenix*:

...there is an issue in this appeal whether Mr McIntyre is a key person of the Appellant: the Secretary considers that he is a key person but the Appellant disputes that and says that he is not a key person. In applying section 52, should the Commission proceed on the basis that it is for the Secretary to establish that he is a key person, or for the Appellant to establish that he is not?

In the Commission's view, the answer lies in the opening words of section 52; namely that the licence application must be refused unless the Secretary is satisfied, in this case, about the suitability of the Appellant or "any key person". Satisfaction under section 52(1)(h) requires satisfaction about both the identity of all key persons and the suitability "in terms of subsection (4)" of each of them. It is not sufficient for an applicant to assert that someone is not a key person or is suitable and argue that its assertion must be accepted unless the contrary is proven. That is not an appropriate approach to the test of satisfaction. Satisfaction means that there is nothing that might arise under section 52 which results in something other than satisfaction. If there are doubts, they are to be resolved by refusing the application.

45. The same analysis applies by direct analogy to section 67(1)(d): the Secretary must refuse an application for a class 4 venue licence unless he is satisfied about both the identity of all key persons and their suitability "in terms of section 68". It is not sufficient for the Appellants to assert that the contested persons are not key persons and argue that its assertion must be accepted unless the contrary is proven. Any doubts are to be resolved by refusing the application for the class 4 venue licence. It is for that reason that the issue does not fall to be determined on the civil standard of proof.

46. Having regard to the opening words of section 67(1), the Commission approaches the primary issue by asking:

On the facts before it, is the Commission satisfied that the key persons in relation to the class 4 venue licence application do not include the rest of HRNZ board members (what the Appellants defined as the contested persons) or any HRNZ executive staff?

Significant degree of influence

47. The question then is whether the Commission is satisfied that the contested persons (the remaining HRNZ Board members) and the HRNZ executive staff are not key persons in relation to a class 4 venue licence by virtue of subparagraphs (iva) or (ivb) of the definition in section 4(1). Subparagraph (ivb) is considered first.
48. In *Operation Chestnut*,¹⁰ Dobson J considered the meaning of key person in relation to a class 4 operator's licence. Michael O'Brien was charged with criminal offences for concealing from the Secretary that he was a key person for a class 4 operator's licence. As it was an element of a criminal charge (in contrast to the present case), to enter a conviction, the High Court was required to find beyond reasonable doubt that Michael O'Brien was a key person in relation to a class 4 operator's licence because he was a person who "exercises significant influence in the management of a corporate society that is an applicant for, or holder of, a class 4 operator's licence" in accordance with subparagraph (iii) of the definition for key person in relation to a class 4 operator's licence.
49. The High Court's approach is now relevant to consideration of a key person in relation to a class 4 venue licence because of the similarity of the foregoing subparagraph to subparagraph (ivb) which was inserted by the 2015 amendment into the definition of key person in relation to a class 4 venue licence. In fact, the High Court referred to venue licence applications in the following key passage:
- Assessment of individuals' suitability is not confined to formal officeholders. The Act uses the concept of "key persons" which is defined, so far as applicants for an operator's licence is concerned, to include persons who exercise significant influence in the management of a corporate society that is an applicant for, or holder of a class 4 operator's licence. Separate applications are required for class 4 venue licences. In such applications, profiles are required for the nominated venue manager, and venue operator. A somewhat different definition of "key persons" applies in relation to a class 4 venue licence.¹¹
50. The Court's comments related to the previous definition of key persons in relation to a class 4 venue licence, **before** subparagraph (ivb) was added on 21 October 2015. The effect of the 2015 amendment was that, as was previously only the case with a class 4 operator's licence, a person may now be a key person in relation to a class 4 venue licence even though he or she holds no formal office.
51. That proposition was confirmed later in the decision:

[142] The authorities recognise that the concept of being concerned in the management of a company will be a question of degree in each case and in

¹⁰ *R v O'Brien* [2017] NZHC 1317.

¹¹ At [8].

deciding whether the requisite extent of involvement had been established, the object of the statute needs to be considered.

[143] The Crown invited analogy with a number of cases in which applicants for class 4 gambling licences have challenged rejection on the grounds of the perceived extent of involvement of persons deemed to be unsuitable. It is unnecessary to review the analyses in those decisions. They are examples of context-specific assessments of the ability of the individuals in question to influence the way the business of a trust would operate. The assessment is a substantive one, not dictated by the form of the governance structure.

52. The Commission concludes accordingly that the application of the definition of “key person” does not turn on a technical consideration, applying only to people holding certain formal positions or offices within a governance structure.
53. In the passage at [143] of the Operation Chestnut decision, the High Court accepted that the object of the statute should also be considered in deciding whether the requisite extent of involvement in management has been established.
54. The purpose of the Act is set out in section 3:
- (a) control the growth of gambling; and
 - (b) prevent and minimise harm from gambling, including problem gambling; and
 - (c) authorise some gambling and prohibit the rest; and
 - (d) facilitate responsible gambling; and
 - (e) ensure the integrity and fairness of games; and
 - (a) limit opportunities for crime or dishonesty associated with gambling and the conduct of gambling; and
 - (b) ensure that money from gambling benefits the community; and
 - (c) facilitate community involvement in decisions about the provision of gambling.
55. The Secretary submitted that the key consideration is the purpose in subparagraph (f). However, in the Commission’s view, subparagraph (g) is similarly relevant to the purpose of the “key persons” definition, by reference to the risk of conflicts of interest resulting in impermissible grant capture. Both purposes support the Secretary’s submissions that the term should be applied to address concerns about the risk of improper control over the distribution of proceeds from class 4 gambling.
56. The following matters result in a lack of satisfaction on the part of the Commission that the remaining HRNZ Board members are not key persons, even on a technical basis:

- (a) As the sole shareholder of CBHL, HRNZ (and, by extension, the Board) can appoint or remove CBHL's directors¹² and approve major transactions.¹³ The Board also manages and administers the funds of HRNZ.¹⁴
- (b) The HRNZ Board members hold regular meetings and can pass resolutions by majority vote. All resolutions are binding on all members of the Board.¹⁵ However, clause 13.7 of the constitution of HRNZ provides: "All members of the Board are entitled to endeavour to have any decision modified or rescinded and to speak in support of such modification or rescission at a meeting of the Board." Any resolution can, therefore, be revoked by a majority of the members of the Board.
- (c) Clause 14.11 of the constitution of HRNZ also provides: "The Board may at any time revoke such delegation made under clause 14.9 and revoke or amend any conditions imposed under clause 14.10 or impose further conditions." Therefore, any delegation made, such as the delegation to the independent Board members on 24 October 2019, may be revoked at any time.

57. As a result, on the assumption the 24 October 2019 resolution had the segregating effect contended for, it is not entrenched and may be revoked by a majority of the HRNZ Board. In other words, the self-denying resolution can be revoked at any time by those whom it excludes from certain decision-making.

58. In that regard, a contrast may be drawn with the position of the HRNZ executive staff. Unlike the Board members, they have no ability to revoke or amend the resolution which currently prevents them from having any influence on the management or operations of CBHL. For that reason, the Commission adopts the common ground position advanced by the parties: the executive staff do not have "the ability, directly or indirectly, to exert a significant degree of influence" over CBHL.

59. Having regard to the purposes of the Act, the Commission has a real concern that a body that has a primary purpose of supporting and promoting harness racing might have influence over the operator of a class 4 gambling venue for the following reasons:

- (a) HRNZ's objects include the promotion and advancement of harness racing in New Zealand.¹⁶

¹² Clause 15.3 of the Constitution of Cardigan Bay Holdings Ltd, Exhibit B to Affirmation of Charlotte Stanley.

¹³ Clause 11.2 of the Constitution of Cardigan Bay Holdings Ltd, Exhibit B to Affirmation of Charlotte Stanley.

¹⁴ HRNZ Constitution, 18 July 2019, at 16.2.

¹⁵ HRNZ Constitution, 18 July 2019, at 13.5 and 13.6.

- (b) The HRNZ Board may do all things necessary for the better control, advancement and promotion of harness racing.¹⁷
- (c) The HRNZ Board may expend monies to contribute to any patriotic or charitable object but otherwise may only expend funds in the interest of harness racing or distribute funds to clubs.¹⁸
- (d) CBHL's directors are permitted to act in the best interests of HRNZ as the holding company.¹⁹
- (e) HRNZ has a practice of regularly investing funds into CBHL without significant return on investment,²⁰ a matter not contested by the Appellants.

60. The Commission's concern is reinforced by the comment of Peter Smith, one of CBHL's directors, in 2016 in the *Roundabout* publication by Rosebank Business Association:

I am a director of Cardigan Bay Holdings which holds the gaming investments for Harness Racing New Zealand. Some parent sporting organisations are entitled to own bars that have gaming machines in them, and that provides income for those sports. Harness Racing New Zealand is one of the lucky sports that is structured in this way.

61. The Secretary submitted that "the ability, directly or indirectly, to exert a significant degree of influence on the management or operations of a venue operator" does not require the Board members to actually influence CBHL's management and operations, but only requires them to have the ability to do so. The Appellants argued, to the contrary, that the definition requires a current legal power to influence and does not extend to theoretical future powers to exert influence only after steps have been taken.
62. The use of the words "ability...to" suggests that neither a current practice of actual influence nor possession of legal power to influence is required.²¹ "Ability" may imply, at best, that a person would be able to take an action lawfully, but it does not imply that a person requires a form of legal power in order to do so.
63. The Appellants also argued that the question of whether a person is a key person is a "forward-focused test" and that past actions do not bring a person within the definition. Subparagraph (ivb) is cast in the present tense, requiring "the ability...to exert".

¹⁶ HRNZ Constitution, 18 July 2019, at 4.1.2.

¹⁷ HRNZ Constitution, 18 July 2019, at 14.3.2.

¹⁸ HRNZ Constitution, 18 July 2019, at 15.2

¹⁹ Clause 18.7 of the Constitution of Cardigan Bay Holdings Ltd, Exhibit B to Affirmation of Charlotte Stanley.

²⁰ Secretary's submissions at [65]; Affirmation of Charlotte Stanley at [18].

²¹ cf. Subparagraph (vi) of the key person definition in relation to a class 4 operator's licence, which provides that a key person is a person who "exercises significant influence".

However, the words do not exclude the possibility of past actions indicating a present ability to exert a significant degree of influence.

64. In the Commission's view, the case for the Appellants focused inappropriately on officeholders and their legal powers. As paragraphs 49 and 51 above indicate, "key person" is not limited in application to officeholders or to the exercise of legal powers. Anyone in a position to influence significantly the state of affairs is a person who can exert a significant degree of influence, directly or indirectly, over a venue operator and is therefore a key person in relation to a class 4 venue licence. Mr O'Brien was found, to the criminal standard, to be a key person of Bluegrass Holdings despite holding no formal office.
65. In addition to the technical powers held by the HRNZ Board and their established patterns of activity, the Commission also takes into account the ability of HRNZ board members to exercise soft power or influence over those acknowledged to be key persons by virtue of their control over CBHL board appointments and their ability to inform them of HRNZ's interests and preferences.
66. For the foregoing reasons, the Commission is not satisfied that the remaining members of the HRNZ board are not key persons in relation to the venue in terms of subparagraph (ivb) of the key persons definition in section 4 of the Act.

Significant interest

67. The Secretary did not argue that either HRNZ Board members or HRNZ executive staff are key persons in relation to the class 4 venue licence by virtue of being persons who have a "significant interest in the management, ownership, or operation of a venue operator".
68. In the Operation Chestnut decision, the High Court, upheld by the Court of Appeal, was satisfied that Michael O'Brien enjoyed a significant interest in the management, ownership and operation of each of the venues in question.²² The profits made by the venues were solely Mr O'Brien's entitlement.²³ Mr O'Brien made decisions on selling venues and the proceeds were dispersed in accordance with his instructions.²⁴ His involvement included deciding when a new venue would be purchased, arranging and providing funding to do so, and providing further working capital when it was needed.²⁵

²² *R v O'Brien* [2017] NZHC 1317 at [200]. The relevant component of the definition of a key person in relation to a venue licence was paragraph (b)(iva) before the amendment in 2015, namely: "any other person whom the Secretary reasonably believes to have a significant interest in the management, ownership, or operation of a venue operator...".

²³ At [199].

²⁴ At [199].

²⁵ At [199].

He decided whether a venue would contract with a particular class 4 operator, and controlled the arrangements with that operator.²⁶

69. The Commission considers that “significant interest” relates to an interest by a person in the management or operations of a venue operator where the person controls financial or other benefits from the management or operations of the venue operator. Control may extend to ensuring that benefits are received by another person, such that the person in question indirectly benefits, for example, by the person’s club receiving benefits derived from the venue operator.
70. There is a suggestion in Peter Smith’s comments in 2016 that harness racing benefits from the proceeds obtained by the operation of gambling machines at venues owned by CBHL but nothing more concrete before the Commission establishes that net proceeds from the venue have been used in this way. However, CBHL’s directors are permitted to act in the best interests of HRNZ as the holding company, which supports the existence of a significant interest by HRNZ Board members in the management, ownership or operation of CBHL.
71. While there is nothing before the Commission to suggest that the HRNZ executive staff have a significant interest in the management, ownership or operations of CBHL, the HRNZ Board members may have a significant interest in the management, ownership or operation of CBHL. On the information before the Commission, it cannot be satisfied that the opposite is the case and that the remaining HRNZ board members are not key persons by virtue of subparagraph (b)(iva) of the key persons definition in section 4 of the Act.

Venue personnel

72. The Appellants submitted that, while HRNZ continues to provide CBHL with “purely routine administration services”, such as bookkeeping and payroll services, those roles are insufficient for the relevant HRNZ staff to be held to be key persons on the basis that they are involved in the management or operations of CBHL. However, the concept of venue personnel includes both those who work at a class 4 venue and those whose work involves dealing with gambling equipment, gamblers, or the proceeds of gambling.
73. The Commission regards it as unlikely that HRNZ staff involved in bookkeeping and payroll services have no involvement in dealing with the proceeds of gambling from machines at Wilson’s Bar. The information before the Commission does not leave it satisfied that the relevant staff are not key persons in relation to the class 4 venue.

²⁶ At [199].

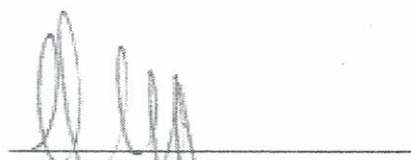
Conditions and sections 113 and 118 of the Act

74. In the Commission's view, it is not practically possible for the HRNZ Board to entrench its resolutions but, even if it could do so, the restriction would be a purely technical one and would not alleviate the concern about soft power or influence, arising from HRNZ having the purpose of supporting and promoting harness racing and being the sole shareholder of CBHL.
75. To alleviate concern about indirect influence over distribution of net proceeds, a condition would need to prohibit TTCF as the holder of the class 4 operator's and venue licences from making grants to harness racing clubs. Section 113 prohibits key persons in relation to class 4 venue licences from, among other things, providing application forms for grant applications, and being involved in decisions about, or in managing, the application or distribution of net proceeds from class 4 gambling conducted by a corporate society that operates at that venue.
76. The relationships that HRNZ board members may have with potential grant recipients or TTCF carry risk of breaches of section 118 of the Act, which prohibits key persons in relation to a class 4 venue licence, among others, from knowingly seeking, receiving or offering benefits with improper conditions attached from or to certain persons, including potential grant recipients or holders of a class 4 operator's licence.
77. There is insufficient information before the Commission to satisfy it in relation to either of these concerns.
78. The Secretary refused TTCF's application on the basis of section 67(1)(r) and (s) of the Act, in addition to section 67(1)(d), because he could not be satisfied that key persons of the class 4 venue would not be involved in activities or decisions prohibited by section 113 of the Act. The submissions by the Secretary and the Appellants did not address this ground directly.
79. The Commission considers that the risk of breach of sections 113 and 118 may also justify refusal under section 67(1)(r) or (s), in addition to section 67(1)(d).

Decision

80. The Commission is not satisfied that all members of the HRNZ Board and all HRNZ executive staff are not key persons in respect of Wilson's Bar. In fact, it finds that the HRNZ board members are key persons on the balance of probabilities and any member of the HRNZ staff involved in bookkeeping and payroll services is similarly a key person.

81. The Commission refers the matter back to the Secretary with a direction to reconsider the decision in the light of those findings.



Wendie Harvey
Gambling Commissioner

for and on behalf of the
Gambling Commission

1 May 2020

